BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Karen Lynch, Charging Party,	)	*HRC Case No. 0021009809*
vs.	)	*Final Agency Decision*
Qwest, Respondent.	)	

I. Introduction

Karen Lynch, the charging party, filed a disability discrimination complaint with the department's Human Rights Bureau against Qwest, her former employer and the respondent, after it fired her for excessive absences. Before the conclusion of the Bureau's investigation into her complaint, Lynch signed a settlement agreement with Qwest that expressly included waiver of any and all claims for individual relief pursuant to any discrimination charges she had filed with any federal, state, or local agency. Lynch subsequently refused to withdraw her discrimination complaint. Her prosecution of it resulted in this hearing. Lynch is not entitled to any relief because of her settlement. However, the department has the power to award affirmative relief against Qwest based upon a finding of illegal discrimination. Qwest is ordered to engage in the interactive accommodation process before discharging an employee with a disability for attendance problems.

II. Procedure and Preliminary Matters

Lynch filed her discrimination complaint with the department on September 17, 2001. She alleged that Qwest, a business corporation qualified to do business in Montana, discriminated against her on the basis of disability (chronic severe migraines) when it discharged her from her employment on or about August 23, 2001. On April 24, 2002, the department gave notice of hearing on Lynch's complaint and appointed Terry Spear as hearing examiner.

The hearing proceeded on September 12 and 13, 2002. The parties stipulated to extend department jurisdiction beyond 12 months after complaint filing, and the hearing examiner continued the remainder of the hearing due to the unavailability of a witness for medical reasons. The hearing reconvened, by agreement of the parties, on February 11, 2003, when the witness was available, and concluded that day. Lynch attended with her attorney, Susan J. Rebeck, Rebeck and Crum. Qwest attended through its designated representative, Stephanie Miles, with its attorney, Oliver H. Goe,

Browning, Kaleczyc Berry & Hoven, PC. The hearing examiner excluded witnesses on Qwest's motion.

Charging party Lynch, Sharon Smith, William Matross, Marge Pepos, Katherine Kountz, Darren Kaihlanen, Julie Paulsen, designated representative Miles and Barbara Stenquist testified. The hearing examiner's exhibit and file dockets accompany this decision. Lynch filed the final post-hearing brief on August 15, 2003.

III. Issues

The issue in this case is whether Qwest illegally discriminated against Lynch in employment on the basis of disability and if so, whether the department, in addition to affirmative relief, can accord her compensatory relief despite her waiver. The final prehearing order contains a full issue statement.

IV. Findings of Fact

1. Since 1989, Charging Party Karen Lynch has suffered from chronic severe migraine headaches. The frequency and duration of the migraines are exacerbated by stress. Lynch's health care provider, certified family nurse-practitioner Dawn Gormely, advised Lynch that her migraines were a permanent medical condition that was unlikely to change in the future but which she might control with diet, vitamins, exercise and medication.

2. The acute pain during her migraines totally incapacitated Lynch. Light and noise became intolerable. During the onset of a severe migraine, Lynch was unable to think clearly, to concentrate, to drive, to read, to watch television, to do household chores, to prepare meals, to groom herself, to exercise, to recreate or to work.

3. Respondent Qwest hired Lynch effective November 30, 1998, as a billing inquiry specialist in the Helena Billing Inquiry Center. Her job duties involved answering customer questions and making adjustments regarding their bills.

4. During Lynch's employment at Qwest, she was a member of and represented by the International Brotherhood of Electrical Workers (IBEW), which had a collective bargaining agreement (CBA) with Qwest.

5. During her employment with Qwest, Lynch was absent from work approximately 1 to 2 days each month due to her migraines. From November 30, 1998, through mid-October 2000, Lynch used sick leave for her

migraines. On February 9, 1999, Lynch received a written warning for having two sick days within the first three months of employment.

6. In May 1999, Lynch received a customer excellence award. On July 27, 1999, Qwest selected Lynch as a mentor for other customer care representatives. On November 19, 1999, Lynch received a team building award that featured a $25.00 prize. In May 2000, Lynch received another customer excellence award and a teamwork award. In June 2000, Lynch received a third customer excellence award.

7. On August 15, 2000, Julie Paulsen, Lynch's supervisor, reviewed attendance standards with Lynch, due to Lynch's continued absences. She told Lynch that her job was not in jeopardy at that time.

8. In September 2000, Qwest converted the Billing Inquiry Center to a Customer Care Center. Lynch and her co-workers began six weeks of training as sales and service consultants, learning to identify customer needs and to sell Qwest products and services. Lynch completed her training before mid-October 2000.

9. On October 10 and 11, 2000, Lynch missed work because her grandfather had died.

10. On October 13, 2000, Lynch first sought medical attention for her migraines.

11. On October 15, 2000, Lynch suffered serious injuries in a motorcycle accident. During her recovery, Lynch had numerous restrictions that prevented her from working. She applied to Qwest for leave pursuant to the Family Medical Leave Act (FMLA) with concurrent short term disability. On November 9, 2000, Qwest's Health Services issued a disability report, showing October 16, 2000, as Lynch's first day absent and certifying the disability. Qwest provided FMLA leave and short term disability to Lynch from October 16, 2000, until January 3, 2001.

12. While off work on short term disability, Lynch received the benefits specified in the CBA between Qwest and the IBEW. Based on longevity, short term disability benefits were at least 60% of regular pay up to full pay.

13. On January 4, 2001, Qwest approved Lynch to work half days on short term disability. Paulsen instructed Lynch to work with Qwest Health Services and her physician to set her return to work schedule. Paulsen also instructed Lynch that a failure to set a workable schedule and follow it could

result in unexcused absences and occurrences which would jeopardize Lynch's employment.

14. Qwest expected Lynch to maintain satisfactory attendance. Qwest intended its occupational employee performance plan and attendance guidelines to ensure that sufficient staff were available to meet the needs of the business and to ensure the best possible service to its customers. Attendance was particularly important in the Customer Care Center in which Lynch worked, which was a call center setting. Qwest had to meet required service standards, imposed by the states in which Qwest operated. For example, some states dictated that 80% of incoming calls be answered within 20 seconds. Qwest's failure to meet such standards could result in fines. Unexpected absences of call center employees could jeopardize Qwest's ability to meet the service standards.

15. Pursuant to Qwest's attendance guidelines, five occurrences, eight days of absence in 12 working months, or both were considered to be unsatisfactory job performance. Unsatisfactory job performance led to disciplinary action, up to and including dismissal. Lynch knew of Qwest's attendance guidelines, from her February 9, 1999, written warning and from the "Orientation for Attendance" she received on August 15, 2000.

16. Qwest considered employee attendance consistent with the expectations set out in its occupational employee performance plan to be an essential function of the job position. To meet the required service standards, consistent attendance according to the schedule was essential for all employees. Qwest considered attendance no differently from sales objectives and other quality or quantity performance objectives. Attendance guidelines applied to all employees, including those working in e-commerce and special needs employees. Qwest did not count FMLA time and concurrent short term disability time as absences or "occurrences" against the attendance policy.

17. Lynch began to work half days with restrictions, from January 4 through January 9, 2001. On January 9, 2001, Lynch exhausted her FMLA leave.

18. Paulsen recognized that Lynch needed to brush up on her training after her prolonged absence. Paulsen supported Lynch in obtaining additional training including providing her with the instructor's schedule and allowing her to pace herself through computer training modules. Paulsen did not set any sales expectations or objectives for Lynch during this period of retraining.

19. On January 10 and 11, 2001, Lynch missed work due to her migraines. She returned and worked a half day on January 12, 2001.

20. On January 17, 2001, Lynch applied for FMLA leave for her migraines at Paulsen's suggestion. On February 1, 2001, Qwest's medical administrator denied Lynch's FMLA request on the grounds that her headaches were not a serious health condition because they were not, at that time, being treated with prescription medications.

21. In February 2001, Paulsen concluded that it was critical for Lynch to begin using her training by taking customer calls. Lynch was concerned that she was not yet ready and became visibly emotional. Paulsen arranged for Lynch to have the opportunity to sit with a peer and listen to calls. Again, Paulsen did not set sales objectives for Lynch. In March 2001 when Lynch went online, Paulsen adjusted the applicable expectations and objectives to the number of hours that Lynch worked.

22. On March 2, 2001, Paulsen gave Lynch a written warning about attendance. She advised Lynch that, due to absences not excused by FMLA or other provisions of the CBA, her attendance was unsatisfactory and that additional absences or other unsatisfactory job performance could result in further disciplinary action, including dismissal.

23. Some of the absences which led to Lynch's unsatisfactory attendance resulted from migraines–one absence each in August and September 2000, and two absences in January 2001. The other absence Paulsen counted for the March warning was a sick day with the flu.

24. Paulsen also suffered with migraines. She did not consider herself disabled or requiring accommodation. She likewise did not consider Lynch disabled or requiring accommodation. Since it had denied Lynch's request for FMLA certification of her migraines, Qwest counted each of the four migraine absences as one unexcused occurrence and one day each, even though Lynch was scheduled to work half a shift per day in January 2001.

25. Qwest approved the following short term disability benefits for Lynch, due to her motorcycle accident, from January 31, 2001, through March 14, 2001: 01/31/01 to 02/02/01– full day short term disability; 02/03/01 to 02/13/01 – half day short term disability (worked half days with restrictions); 02/14/01 to 02/28/01 – full day short term disability (knee surgery); 03/01/01 to 03/14/01 – half day short term disability (worked half days with restrictions). On March 14, 2001, Lynch returned to work at Qwest full time.

26. On March 20 and 21, 2001, Lynch received commendations from her customers.

27. On March 22, 2001, and March 23, 2001, Lynch missed work due to swelling in her knee as a result of the knee surgery related to the October 15, 2000, motorcycle accident.

28. On March 23, 2001, Lynch received notice that her short term disability leave resulting from the motorcycle accident had terminated effective March 14, 2001.

29. By April 2001, Lynch demonstrated that she had the training and skills to perform her position as a sales and service consultant and did not require additional training. In April, she received a customer excellence award. On April 20, 2001, Lynch received customer commendations. For the month of April 2001, Lynch met all the sales objectives for that month and had a net sales revenue of 100% of Qwest's expectations.

30. On May 4, 2001, Lynch received a warning of dismissal at a meeting with Sharon Southern, who had replaced Paulsen as her supervisor. Southern advised Lynch that as a result of her absences her job was in jeopardy and in the event of additional absences or other unsatisfactory job performance, further disciplinary action could result, up to and including dismissal. Lynch's union steward, William Matross, attended the meeting with Lynch. Matross asked Southern not to consider the March 22-23 absences as "absences or occurrences" as defined by the attendance guidelines, because they were related to her prior motorcycle accident and FMLA leave.

31. On May 8, 2001, Lynch sought and obtained a prescription for Zomig, her first prescription medication for migraines.

32. On May 10, 2001, the IBEW filed a grievance on Lynch's behalf for the May 4 warning.

33. On or about May 15, 2001, Lynch reapplied for FMLA leave for her headaches. On May 16, 2001, Lynch's medical provider completed the documentation necessary to support her request for FMLA for her headaches. In May 2001, Sedgwick C.M.S. [Sedgwick] was the health plan administrator for Qwest.

34. On June 1, 2001, Lynch sent an e-mail message to Southern, explaining that Lynch felt she needed additional training.

35. Qwest's internal evaluation of Lynch on June 1, 2001, indicated that she was "exceeding standards."

36. On June 8, 2001, Sedgwick approved FMLA leave for Lynch's headaches. According to the FMLA approval, Lynch was approved for

intermittent incapacity (one to two days per month) for one year, beginning May 16, 2001, through May 16, 2002.

37. On June 20, 2001, IBEW filed a second grievance on Lynch's behalf for the May 4, 2001, warning.

38. For July 2001, Lynch received a customer excellence award.

39. On July 17, 2001, Southern met with Lynch and again warned her of the danger that she would lose her job if her absences continued. Lynch asked if her migraine absences could be excluded from the tally of unexcused absences. She did not receive an answer at that meeting.

40. On July 30, 2001, Lynch again met with Southern. Southern told Lynch she was not willing to set a precedent by excluding migraine absences from the tally of unexcused absences. Southern reiterated that further unexcused absences would result in Lynch losing her job.

41. For July 2001, Lynch's net sales revenue was at 91.83% of the objective Qwest set for her, which compared favorably with the performance of other employees in the call center. Lynch's availability percentage, according to Qwest, was at 86.74%.

42. From August 14, 2001, through August 22, 2001, Lynch experienced a massive headache that did not respond to her medication. She was absent from her work at Qwest as a result.

43. On August 16, 2001, Qwest management held a telephone conference with Stephanie Miles, Qwest's lead labor relations manager for the service area including Montana. Miles held the senior management position in human resources for the area. She acted as Qwest's bargaining agent with unions, trained managers on Qwest's human resources policies, heard and adjudicated grievances on behalf of Qwest, represented the company in advisory bench arbitrations and provided counsel to Qwest management regarding CBA terms and conditions.

44. The purpose of the August 16 telephone conference was to decide what to do about Lynch. Southern and Cindy Antonia participated as the Qwest management decision-makers. Miles wanted to make sure that the managers understood the consequences of firing Lynch based on her absences. Marge Pepos took notes for the meeting. Miles voiced concerns of "just cause" (good reason for terminating Lynch's employment) and potential claims under the Americans with Disabilities Act (ADA). Miles suggested giving Lynch a suspension and continuing her employment subject to discharge if she had

continued excessive absences by the end of October. Southern opposed this suggestion.

45. At the meeting on August 16, 2001, length of employment was a consideration. Qwest would have treated Lynch differently if she had worked for the company for 20 years. Miles stressed that because Lynch's attendance issue related to a health condition or concern, she could assert disability discrimination under the ADA. Southern and Antonia decided that they did not want to suspend a short term employee (Lynch) before termination of her employment. They had never before done a suspension for an incidental absence case. They did not want to set a precedent that suspension would precede discharge in the discipline of short term employees for excessive absenteeism.

46. Qwest calculated and recalculated the absences it counted against Lynch as excessive. It found different totals at various times. Even at hearing, the chargeable excess absence number remained uncertain. However, without the absences resulting from Lynch's migraines, Qwest would not have counted enough excessive absences to discharge Lynch in August 2001.

47. Miles considered one component of the "just cause" analysis to be job performance. Qwest only reviewed Lynch's negative history in the evaluation of her performance during August 16, 2001, meeting.

48. Qwest decided to terminate Lynch's employment. Southern and Antonia reached the decision. They did not consider whether Lynch would still have sufficient excessive absences to merit discharge if they excluded absences for migraines. They did not consider whether any accommodation was possible for Lynch's headaches. They did not do an individualized assessment of Lynch's condition to ascertain whether she had a disability. They did not evaluate the specific demands of this call center to ascertain whether any accommodation was possible. They did not want to consider alternatives to discharge, because it would be easier to schedule call center coverage if Qwest fired Lynch.

49. On August 16, 2001, Lynch's migraines had substantially limited her performance of work for more than two years. She had been unable to perform the entire class or range of jobs that required regular attendance without absences on short notice. Her migraines, though worsening after her motorcycle accident, caused chronic limitations. The impairment resulting from her migraines was a substantial limitation to her working because it interfered for a long enough time so that she had trouble securing and retaining her employment. Had she not suffered from her migraines, she would not have been limited in her working in this fashion.

50. Miles was aware of the risk of claims of discriminatory discharge if Qwest proceeded to fire Lynch in August 2001. Nevertheless, after she advised Qwest local management of those risks, she deferred to their decision to fire Lynch. There is a substantial risk of similar deference to management decision-making in comparable situations, unless Qwest educates its Montana decision-makers and constrains their discretion in accord with Montana law.

51. On August 22, 2001, Lynch sought treatment from her medical care provider who gave her two injections that alleviated her pain. She returned to work on August 23, 2001, and received notice that Qwest was terminating her employment for unsatisfactory attendance.

52. On August 24, 2001, the IBEW filed a grievance on behalf of Lynch for the termination of her employment.

53. On September 6, 2001, Barbara Stenquist, Lynch's IBEW representative, met with Southern regarding Lynch's firing. Stenquist advised Southern that Lynch sought to be reinstated and to be made whole.

54. In September 2001, Qwest was offering voluntary termination payment (VTP) to customer care personnel, as an inducement for them to leave the company.

55. Lynch filed a formal disability discrimination complaint with the department on September 17, 2001. She received a department pamphlet entitled "Rights of Persons with Disabilities in Employment." The pamphlet did not discuss monetary recovery under the Human Rights Act.

56. The department's Human Rights Bureau sent notice of the complaint filing, with a copy of the complaint, to Qwest and commenced its standard investigative procedure regarding the complaint.

57. On September 25, 2001, Miles learned that Qwest had received a copy of Lynch's disability discrimination complaint. Miles told Stenquist about the complaint the same day.

58. On September 27, 2001, during a conversation regarding Lynch's grievances, Miles suggested to Stenquist that all three grievances be addressed together. Miles and Stenquist discussed resolving the claims under the VTP packages Qwest was offering to employees in the call center.

59. In late September, Lynch and Stenquist discussed the possibility of a settlement based on the VTP package. Lynch told Stenquist that she would settle with Qwest for the VTP, together with payment of lost wages from August 23, 2001, to September 28, 2001. Lynch also "wanted her name

cleared," *i.e.*, she wanted Qwest's records to reflect her departure as voluntary rather than a discharge.

60. Lynch also discussed settlement with Katherine Kountz, the Human Rights Bureau officer investigating her complaint. Kountz normally discussed the relief available under the Human Rights Act with unrepresented claimants when discussing settlement or when a claimant asked about it. Kountz explained the investigative process to Lynch on October 2, 2001. Kountz and Lynch discussed the Qwest settlement offer. Kountz explained that she as well as Stenquist could give Lynch's settlement proposals to Qwest. At that time Lynch reasonably could have discovered the possibility of recovering money damages from Qwest for illegal discrimination, had she asked Kountz.

61. Miles made an offer of the VTP package to Lynch (through Stenquist) in mid-October 2001. On October 18, 2001, Stenquist responded that Lynch also wanted wages between August 23 and September 28, 2001, and wanted her name cleared.

62. On November 8, 2001, Miles made a counteroffer to Stenquist of the VTP package, an adjustment of Qwest's records to reflect voluntary resignation by Lynch effective September 28, 2001 and payment of $2,000.00 less the applicable payroll taxes. Miles contemplated a settlement of all claims Lynch had made or could make against Qwest.

63. Between August 23, 2001 and December 10, 2001, Lynch received $4,064.00 in unemployment benefits. Nonetheless, in November 2001, Lynch could not pay her rent and borrowed money from her mother to make ends meet. She felt her financial hardship was extreme.

64. On November 13, 2001, Kountz forwarded an offer of settlement on behalf of Lynch to Qwest. Lynch was aware that the settlement negotiations with Qwest were to resolve all issues, including her discrimination claim, because Stenquist told her this several times. Stenquist also told Lynch that to pursue her discrimination claim an attorney would probably be necessary. She also pointed out to Lynch that Qwest was better able to afford litigation.

65. On November 16, 2001, Miles and Stenquist discussed trading Lynch's legal entitlement to extended health insurance benefits ("COBRA benefits") upon termination of her employment for a full $2,000.00 payment, without deduction of payroll taxes.

66. Miles called Stenquist on December 3, 2001, and offered $2,200.00 less taxes, the VTP package, settlement and release from Lynch of all claims

and Qwest adjustment of its records to reflect voluntary termination of employment instead of discharge.

67. After Qwest discharged her, Lynch did not find work until December 17, 2001, when she began work with the Student Assistance Foundation, earning $21,000.00 a year.

68. On January 8, 2002, Miles and Stenquist spoke again. Miles proposed two alternative settlements. Qwest would pay either $2,813.20 less unemployment or $2,200.00 less applicable taxes, with Lynch eligible either way for the VTP and amendment of Qwest's records to reflect a voluntary resignation rather than a discharge. Stenquist called Miles back and accepted the $2,200.00 payment with the VTP and voluntary resignation. Lynch, through Stenquist, agreed to this settlement on January 8, 2002.

69. On January 9, 2002, Miles sent a proposed release ("Settlement Agreement, Release and Waiver," Exhibit 501) to Stenquist, requesting that IBEW return it with Lynch's signature by January 11, 2002. On January 9, Stenquist left a message for Lynch to come in and read the agreement, indicating that Qwest wanted her to sign the agreement by January 11. On January 10, Lynch left a message indicating that she would come in and sign the agreement on January 11, 2002.

70. On January 11, 2002, Lynch read and then signed the release in the IBEW offices. Stenquist was not present, but other IBEW representatives were present in the office. Lynch did not ask them any questions about the settlement agreement at the time she signed it.

71. When she signed the release, Lynch understood that it resolved her grievances and her claims under the Human Rights Act. She understood, from previous discussions between Stenquist and Miles, that Qwest expected her to withdraw her complaint. Under the terms of the release, Lynch released and discharged Qwest from any and all claims arising out of her employment and its termination, including any and all claims brought pursuant to the ADA. In addition, the release specified that Lynch waived her right to seek any individual relief with respect to any charges of discrimination filed with any federal, state, or local agency.

72. Included in the terms of the release was a provision that the agreement was effective when all of the following had occurred: (1) Lynch signed it; (2) the revocation period (if any) for Lynch expired; (3) the signed agreement was returned to Miles and (4) any "claims" by Lynch had been withdrawn and dismissed with prejudice.

73. The release defined "claims" to include "any . . . claim of any kind" between Lynch and Qwest. The definition went on to specify "including but not limited to" certain kinds of claims. Discrimination claims under the Montana Human Rights Act were not specified within those certain kinds of claims. It also specified that Lynch authorized IBEW to withdraw any pending grievances, arbitration or NLRB claim on her behalf. It did not include discrimination complaints within that provision. Despite the omission of specific references to her Human Rights Act complaint in those provisions of the release, Lynch could not reasonably have believed that her human rights complaint was anything other than a "claim." When Lynch signed the release, she gave Qwest an informed waiver of a known right.

74. The terms of the VTP offer required acceptance by completion of the packet documents and return of them to Qwest. The release, in providing that Qwest would pay Lynch her entitlement under the VTP offer, referenced the CBA and the letter of agreement creating the VTP. Lynch knew or reasonably could have ascertained the terms of the VTP offer before signing the release. The release unambiguously bound Qwest to provide the VTP to Lynch.

75. The VTP offer, as Lynch could have verified by reading the documents, provided that the separating employee could elect to receive payment in a lump sum within 60 days of separation from employment. The provision contemplated that the separating employee would complete the packet and make the election at the time of separation. That obviously could not happen with Lynch, whose separation date under the release was September 28, 2001, the end date for the wage payment she would receive. Had she verified the terms of the VTP offer, she could have reached a specific understanding with Qwest, through Stenquist, about the timing of the lump sum payment after her completion of the packet.

76. The release contained a provision that it was the entire agreement between the parties, notwithstanding any prior discussions, and could only be modified thereafter in a writing signed by Qwest and Lynch.

77. The release also contained a provision by which Lynch released IBEW from any claims she might have that arose of out the union's representation of her. This provision was part of Qwest's "boilerplate" (standard) release language. Another union with a collective bargaining agreement with Qwest, not the IBEW, had previously requested that Qwest include that provision in its standard releases and Qwest had done so.

78. Stenquist fairly represented Lynch in the process that led to Lynch signing the release.

79. Stenquist had requested the check as soon as the release was signed. Lynch did not try to contact Stenquist with questions she had concerning the release before she signed it. After signing it, she contacted Stenquist to find out where the check was. Lynch came to the union office and picked up the check (dated January 17, 2002, for $1,305.70). She cashed it.

80. Kountz had a deadline for writing a final investigative report on Lynch's human rights complaint. In the normal investigative process, she would have received Qwest's written response to the complaint well in advance of the deadline. Because she knew about the settlement, and the expected withdrawal of the complaint, Kountz had allowed Qwest to delay filing that response.

81. On February 21, 2002, Kountz phoned the attorney representing Qwest in the Human Rights Bureau investigation of Lynch's complaint. She told the attorney that Lynch would not withdraw her complaint until she received payment under the release. Kountz asked the attorney to expedite payment to Lynch. Otherwise, Kountz said she would write her findings regarding the investigation without a response from Qwest.

82. On February 25, 2002, Miles called Stenquist and asked Stenquist why Lynch's ADA claim had not been withdrawn.

83. Stenquist was familiar with the terms and provisions of the VTP. Forty-one other Qwest employees from Lynch's call center had taken advantage of the VTP offer. Stenquist knew that an employee who elected the VTP received a packet of materials to return to Qwest before receiving the VTP payments. Stenquist explained this process to Lynch. Lynch advised Stenquist that she would not withdraw her human rights complaint until she received all the money.

84. Lynch made a unilateral decision to condition withdrawal of her human rights complaint upon first receiving the VTP payment as well as the initial check. Qwest did not agree to this condition, which Lynch asserted after signing the release.

85. On February 27, 2002, the Qwest attorney called Kountz and reported that Lynch had agreed to the withdrawal. The attorney said that Lynch had not understood that she had to apply for pension money and only initially got paperwork to apply for it. The attorney also said that Lynch would be in Kountz's office the next day to do the withdrawal. Kountz replied that she found the settlement circumstances odd, but if Lynch chose to withdraw, that was acceptable. Kountz added that, due to her deadline, if

Lynch did not withdraw the complaint, Kountz would write the final investigative report with what was in the file, without Qwest's response.

86. On February 28, 2002, Kountz received messages from Lynch, indicating that Lynch did not want to withdraw the complaint as Qwest was telling her that she had to apply for benefits. Lynch asserted that Qwest had told her on January 11 that she would have the money within 60 days. Lynch did not want to withdraw her complaint until she received all the settlement money, and indicated that she had told Qwest that the deal was off unless she received the money by March 11, 2002.

87. Qwest twice sent to Lynch the packet of documents necessary to receive the VTP. Qwest directed one packet, by Federal Express on or about March 15, 2002, to the most current address in its files. Lynch had moved from that address by that time. Lynch did receive at least one packet. On the advice of her attorney, Lynch did not complete and return the documents in the packet, which were necessary to receive the payment and benefits under the VTP. Lynch also has never returned the packet necessary to elect COBRA benefits. The time for that election has passed. Lynch understood that, even at hearing, she could receive the rest of the VTP payment and benefits if she returned the required paperwork.

88. Qwest changed some of its computerized records to reflect that Lynch left due to voluntary resignation. Other records still reflect that Qwest fired her. Qwest failed to change those records either through administrative error or because its procedures to amend leaving employment records did not address those records.

89. Kountz proceeded to write her investigative report, finding cause to believe illegal discrimination occurred. That report triggered department efforts at conciliation. Failure of those efforts resulted in the commencement of contested case proceedings on Lynch's complaint, leading to a contested case hearing and this final agency decision.

V. Opinion[1]

Montana law prohibits employment discrimination based on disability when the essential tasks of the job do not require a distinction based on disability. Mont. Code Ann. § 49-2-303(1)(a). The preliminary issue in this case is whether the release bars Lynch's prosecution of her complaint and further bars a department award of relief if illegal discrimination is found.

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[1] Fact statements in the opinion supplement fact findings. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

A. The Release

Department proceedings are the first step in pursuing the exclusive remedy for illegal discrimination under the Human Rights Act (with limited irrelevant exceptions). Mont. Code Ann. § 49-2-509(7). The department has the initial power to determine its own jurisdiction, and therefore will decide the validity of the release as a defense to this complaint.

The validity of a settlement agreement rests upon contract principles. ***E.g.***, *Patton v. Madison County* (1994), 265 Mont. 362, 877 P.2d 993*;* ***and*** *Heatherington v. Ford Motor Co.* (1992), 257 Mont. 395, 849 P.2d 1039. The requirements for a contract are parties capable of contracting, a lawful object, sufficient consideration and mutual consent. Mont. Code Ann. § 28-2-102.

1. Capacity

The parties were capable of contracting. Lynch may have felt "rushed," as she argued, when she signed the contract, but there was no good evidence that she was not capable of entering into the agreement or deciding to reject it.

2. Object

Settlement of existing claims is a lawful object for a contract. In fact, it is a favored lawful purpose. There are statutes approving arbitration of such disputes and there are rules excluding settlement discussions from liability determinations in litigation. ***Cf.***, Mont. Code Ann., Title 27, Chapter 5 ***and*** Rule 408, M.R.E.

3. Consideration

The release was supported by sufficient consideration. It relieved Qwest from both the expense of defending against Lynch's various claims and the exposure attendant upon those claims. The release provided Lynch with money, the VTP entitlement and the change of her separation status from termination to voluntary resignation.

The release did include the human rights complaint (even though it was not specifically referenced by case number) in what Qwest received for the entire consideration given to Lynch. When the parties reduced their agreement to writing, their intent is found, if possible, in the writing alone. Mont. Code Ann. § 28-3-303. Their intent at the time of contracting is the issue. Mont. Code Ann. § 28-3-301. No matter what offers and counteroffers had been exchanged, the release itself indicated the consideration to each

party, and what Lynch received was sufficient. Lynch failed to prove that the human rights complaint was a last minute addition to the bargaining. Even if she had proved Qwest added the human rights complaint at the last minute, there was no binding agreement until the release was signed. Therefore, the entire consideration given by Qwest is weighed against the entire consideration given by Lynch, and (by express release term) prior discussions are disregarded. There is no evidence that the value Lynch received was wholly inadequate for the value she gave. There had yet been no determination of merit by the Human Rights Bureau, so the complaint had only an undefined potential value.

4. Consent

Lynch unconditionally accepted Qwest's unconditional offer (the release), making it a binding agreement. ***E.g.***, *Bar OK Ranch Co. v. Ehlert*, 2002 MT 12, ¶ 36, 308 Mont. 140, 40 P.3d 378, ***quoting and citing*** *Marta Corp. v. Thoft* (1995), 271 Mont. 109, 894 P.2d 333, 335 ***and*** *Hetherington v. Ford Motor Co.* (1992), 257 Mont. 395, 849 P.2d 1039, 1042. However, her apparent consent in signing the release was not real if it was obtained through duress, undue influence or mistake and Lynch would not have signed the release otherwise. Mont. Code Ann. § 28-2-401. The release is also ineffective as to the discrimination claim if the provisions releasing that claim were unconscionable. *All States Leasing Co. v. Top Hat Lounge* (1982), 198 Mont. 1, 649 P.2d 1250, 1252-53. All of these arguments rest, in significant part, upon Lynch's contention that IBEW either colluded with Qwest or at least failed adequately to represent her in the negotiations.

a. Collusion, Duress, Undue Influence and Mistake

Lynch failed to prove collusion. She also failed to prove inadequate representation. Stenquist credibly testified that she advised Lynch that the human rights complaint was included in the settlement and that Lynch could pursue the complaint but would probably need an attorney. Lynch had other resources (Kountz, for example) for more information about possible recovery under that complaint. She knew or could reasonably have found out about her recovery rights. Likewise, Lynch either did know or could readily have discovered through Stenquist or the IBEW generally what the VTP offer entailed. Lynch had the means and opportunity to inform herself about what the settlement meant in any of its particulars. She did not prove that the union was responsible for her understanding (or alleged misunderstanding) of the release when she accepted and signed it.

Taking away the inadequate representation/collusion component, Lynch did not prove duress, undue influence or mistake. Lynch testified about her financial desperation, but by the time she signed the release she had new employment. There was no evidence that Qwest exploited her alleged financial hardship and forced her to sign an otherwise unacceptable release. Indeed, Qwest's motive for trying to hurry finalization of the settlement was to avoid filing a response in the human rights investigation. There was no evidence Qwest wanted to avoid the response because it would be damaging in the case or because Lynch was uniquely susceptible to pressure at that time. It was at least equally likely that Qwest wanted to avoid the time and expense involved in preparing the response.

Qwest did not take unfair and grossly oppressive advantage of Lynch by exploiting her confidence or its authority over her. *Westlake v. Osborne* (1986), 220 Mont. 91, 713 P.2d 548, 551, ***quoting*** Mont. Code Ann. § 28-2-407. Lynch had no confidence in Qwest. She did not rely upon Qwest in accepting the release. She neither trusted Qwest nor considered it to have any authority over her.

Lynch knew or should have known of the terms of the VTP offer, as already discussed. Any mistake about the terms of the release was therefore neither a mistake of fact, since it resulted from Lynch's failure to make adequate inquiry about those terms, Mont. Code Ann. § 28-2-409,[2] nor a mutual mistake of law, since any mistake about the law was Lynch's alone and unknown to Qwest at the time, Mont. Code Ann. § 28-2-410.[3]

b. Conscionability

Justice Nelson's special concurrence in *Kloss v. Edward D. Jones & Co.*, 2002 MT 192, ¶¶ 48-77, 310 Mont. 123, 54 P.3d 1, exhaustively discusses unconscionability in contracts. This case does not present the glaring disparities in relative positions present in *Kloss*. Unlike Kloss, Lynch did not rely upon Qwest and sign the agreement based on its explanations, without reading it. Kloss relied upon her investment broker instead of reading the Full Service Account and the Customer Loan Account agreements she signed, each of which contained the arbitration clause at issue in the case.

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[2] "Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake . . . ."

[3] "Mistake of law constitutes a mistake . . . only when it arises from: (1) a misapprehension of the law by all the parties . . .; or (2) a misapprehension of the law by one party of which the others are aware at the time . . . ."

Lynch's situation was also distinguishable from that of the plaintiff in *Kelly v. Widner* (1989), 236 Mont. 523, 771 P.2d 142. In *Kelly*, there were three critical factors which are all absent here.

First, Kelly's dire financial situation, lack of education, lack of legal advice and isolated living arrangements created a vulnerability the defendant exploited. 771 P.2d ***at*** 145. The differences between Kelly's situation and that of Lynch are considerable. Unlike Kelly,[4] Lynch had a job and income, was not isolated in a cabin without means of communication, did not negotiate directly (on short notice) with professional insurance adjusters and did not sign a release without the opportunity to consider the agreement and consult with (if she elected to seek them out) her union representative, the human rights investigator and even an attorney.

Second, Kelly was still incapacitated from her injuries and had a questionable prognosis for recovery. Thus, her losses from her injuries were uncertain and settlement was premature. 771 P.2d ***at*** 145. Third, Kelly signed a complete release for barely enough to pay current medical expenses, with at least three-fourths of her minimum physical recovery still ahead of her, after a mere half hour in discussion with the adjusters. 771 P.2d ***at*** 145-46. Unlike Kelly,[5] Lynch was back to work in her new job and the frequency of her

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[4] Kelly was 45, had a 9th grade education, was divorced, and lived alone in a rented log cabin with no phone and a car that did not run. She had worked as a waitress, for $2.75 an hour. With her leg in a cast due to her injuries in the auto accident, she could not work at all. At the time of settlement and for the month before the settlement, she lived on $10.00 and food stamps. When the insurance adjusters wanted to contact her, the driver (she had been a passenger in the car) took her to his home to talk with the adjusters on the phone. They questioned her by phone about the accident and her injuries. The next day, on 30 minutes notice, they came to her cabin, asked about her medical bills, lost wages, and income and made out a check for $5,325.00, which she signed over to the hospital, and a check to her for $3,634.00. From the $3,634.00, she paid $1,542.00 in doctor bills and kept $1,460.00 for lost wages. The adjusters were at the cabin for about 30 minutes. Kelly did not have a lawyer. She gave the adjusters a full release of all claims for the checks. 771 P.2d ***at*** 143-44.

[5] When she released her claims, just 2 months after the accident, Kelly had a steel rod surgically inserted in her hip and her leg cast was due to remain for another eight months. The extent to which she would recover was uncertain. She was unable to work and would remain so for an uncertain additional amount of time. The Court concluded that her "physical condition suggests that this was not an appropriate time for execution of a complete release." 771 P.2d ***at*** 145. The Court went on to conclude that the adjusters "procured a very hasty settlement in this case, spending only half an hour in the total discussion. When they left, Ms. Kelly had released all claims, yet received barely enough money to pay her medical expenses through the date of settlement. There is an issue of fact whether the checks issued to Ms. Kelly were adequate under the circumstances known by the parties at that time. The appropriateness of having Ms. Kelly execute a complete release in her particular situation, and procured in that manner, is subject to question." 771 P.2d ***at*** 145-46.

headaches had diminished and stabilized; her losses were clear. She agreed to a settlement after several months of negotiations, including offers and counteroffers, in which she had assistance and was not isolated and dealing by herself, while physically and emotionally weak, with professional adjusters.

In *Kelly*, the Court held that these factors raised sufficient fact questions about the release to reverse summary judgment for the defendant and remand for trial on the merits of whether the release was unconscionable. Like Kelly, Lynch prevailed against a defense summary judgment motion. At trial Lynch failed to prove on the merits that the release was invalid. She did not prove by a preponderance of the evidence that Qwest subjected her to the exploitation and oppression sufficiently suggested by the motion records in *Kelly* and in this case to justify sending both cases forward to trial.

Lynch had access to the full information about the consideration she would receive in the release, through Stenquist and the Union. She had access to a knowledgeable and neutral investigator regarding her discrimination claim (Kountz). She was on notice that pursuing the claim would probably require a lawyer, so she could have sought legal advice. On its facts, if this settlement was unconscionable, no defendant could settle any claim without first referring the claimant to an attorney, and that clearly is not the law of Montana.

5. Attempted Revocation

Lynch did not have a revocation right pursuant to the release itself. The release provided that it was effective when Lynch signed ("executed") it, returned it to Miles and withdrew and dismissed her claims, so long as she had not revoked it "during the revocation period, *if any*" [emphasis added]. The only other mention of revocation in the release states that Qwest would pay the initial lump sum, which it did pay on January 17, 2002, "contingent upon execution of this agreement without revocation." Whether or not "execution" meant "signature" in this context as well, the boilerplate inclusion of this reference to "revocation," without any specific contract provision creating and defining a right of revocation, did not alone establish such a right. The release did not contain an extended right to revoke the agreement after signing it and receiving the initial payment.

Lynch had no right under the release to add unilateral conditions to its written terms. She could not modify the terms of the release at her whim and require Qwest to perform the modifications. The release required a mutual agreement in writing to any modifications. Lynch's purported revocation, because Qwest failed to make the VTP payment within the time frame Lynch dictated after she signed the release, was ineffective. She had no such right.

The release bars Lynch's claims for individual relief because of alleged illegal discrimination.

6. Affirmative Relief Is Possible Despite the Release

Even though the release barred Lynch's claims, the department still exercises the Commissioner's power to proceed against possible illegal discrimination. Mont. Code Ann. § 49-2-210. Pursuant to that provision, the department can intervene and seek appropriate affirmative relief if a settling respondent in a particular case does not agree to it. If the hearing examiner had decided the fact question of the release's validity on summary judgment, the department could have intervened. When the hearing (like this hearing) revealed that Qwest illegally discriminated, affirmative relief would have been mandatory, and still is, without department intervention. The finding of discrimination triggers affirmative relief. Mont. Code Ann. § 49-2-506(1).[6] Thus, while Lynch has no recovery right, the department remains bound to enforce the law and address the risk of repetition of the discrimination found.

B. Discriminatory Discharge

Montana law prohibits employment discrimination based on disability, when the essential tasks of the job do not require a distinction based on disability. Mont. Code Ann. § 49-2-303(1)(a). Discrimination because of disability includes firing an employee because of disability, without first making inquiry to determine whether a reasonable accommodation is appropriate for an employee who seeks to continue employment despite a disability. An accommodation is not reasonable if it involves either undue hardship to the employer or danger to the health or safety of any person, including the claimant. Mont. Code Ann. § 49-2-101(19)(b). An employer has a legal duty to make independent inquiry regarding accommodation before discharging the employee. *Reeves v. Dairy Queen* 1998 MT 13, ¶¶ 42-43, 287 Mont. 196, 953 P.2d 703.

To establish disability discrimination in employment, Lynch must show that (1) she had a disability; (2) she was otherwise qualified to retain her job and capable of doing that job with an accommodation; and (3) Qwest discharged her from her job because of her disability. *Reeves* ***at*** ¶ 21; ***citing***

[6] "If . . . the department, after a hearing, finds that a party against whom a complaint was filed has engaged in the discriminatory practice alleged in the complaint, the commission or the department shall order the party to refrain from engaging in the discriminatory conduct. The order may: (a) prescribe conditions on the accused's future conduct relevant to the type of discriminatory practice found; . . . (c) require a report on the manner of compliance." Mont. Code Ann. § 49-2-506(1) (emphasis added).

Hafner v. Conoco, Inc. (1994), 268 Mont. 396, 886 P.2d 947, 950; ***see also*** Mont. Code Ann. §§ 49-4-101 ***and*** 49-2-303(1)(a).

Lynch proved the elements of her claim. She presented evidence that she had a disability. There was no legitimate factual dispute concerning her ability to do the job apart from the absence problem, which resulted from her medical problems – she was otherwise qualified for the job. She presented evidence that Qwest could have accommodated her and that she requested an accommodation to address her absence problems. She proved that Qwest discharged her because of her disability.

Qwest challenged the sufficiency of the evidence to establish both that Lynch had a disability due to her migraines and that an accommodation was possible with regard to attendance. The finding of illegal discrimination rests upon the facts regarding those two issues.

1. Disability

Disability is defined by statute. It is an impairment that substantially limits one or more major life activities. Mont. Code Ann. § 49-2-101(19)(a). Whether impairment resulting from illness is a disability under the Montana law is a fact question, decided on a case-by-case basis. ***E.g.***, *Reeves*, ***op. cit.***

Work is a major life activity. *Walker v. Montana Power Company* (1999), 278 Mont. 344, 924 P.2d 1339; *Martinell v. Montana Power Company* (1994), 68 Mont. 292, 886 P.2d 421. A substantial limitation upon performance of work means the individual is unable to perform a class of jobs or a broad range of jobs as compared to an "average" person with comparable training, skills and abilities. 29 C.F.R. 1630.2(j)(3).

Federal regulations note that temporary, non-chronic limitations "are *usually* not disabilities." 29 C.F.R., Part 1630 App., §1630.2(j) (emphasis added). Many jurisdictions have determined that various kinds of temporary conditions – from pregnancy-related limitations to carpal tunnel syndrome – are not disabilities.[7] Each case turns on its own facts.

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[7] *Heintzelman v. Runyon* (8th Cir. 1997), 120 F.3d 143; *Robinson v. Neodata Services* (8th Cir. 1996), 94 F.3d 499; *Sanders v. Arneson Products* (9th Cir. 1996), 91 F.3d 1351; *Roush v. Weastec, Inc.* (6th Cir. 1996), 96 F.3d 840; *Rogers v. International Marine Terminal* (5th Cir. 1996), 87 F.3d 755; *McDonald v. Commonwealth of Pa.* (3rd Cir. 1995), 62 F.3d 92; *Hughes v. Bedsole* (4th Cir.), 48 F.3d 1376, ***cert.den.*** (1995), 516 U.S. 870; *Evans v. Dallas* (5th Cir. 1988), 861 F.2d 846; *Grimard v. Carlston* (1st Cir. 1978), 567 F.2d 1171; *Scott v. Flaghouse, Inc.* (S.D.N.Y. 1997), 980 F.Supp. 731; *Wallace v. Trumbull Memorial Hosp.* (N.D.Ohio 1997), 970 F.Supp. 618; *Harris v. United Airlines, Inc.* (N. D. Ill. 1996), 956 F.Supp. 768 ; *Gerdes v. Swift-Eckrich* (N. D. Iowa 1996), 949 F.Supp. 1386;

Montana follows the federal interpretation (and decisions from other jurisdictions) that temporary impairment can be a substantial limitation to working when it interferes for long enough time so that the worker has trouble securing, retaining or advancing in employment. *Reeves*, ***op. cit.***, ¶29-29; *Martinell*, ***supra***. The Montana Supreme Court in *Martinell* approved an analysis that "transitory and insubstantial" conditions (like influenza or a cold) were not disabilities. ***Id. at*** 429-30. Martinell's conditions, in contrast to such transitory and insubstantial conditions, did constitute a disability, because they had lasted for two years and had cost her potential promotions and her job. ***Id. at*** 430.

Montana looks at the facts of each particular case to address disability questions under the state's laws. ***Cf.***, ***e.g.***, *Butterfield v. Sidney Public Schools*, 2001 MT 177, 306 Mont. 179, 32 P.3d 1243; *Adamson v. Pondera County*, HRC Nos. 9501006838 & 9601007417 (1999). In *Butterfield*, the Supreme Court relied upon the underlying facts of limitations in a broad category of work and reinstated a department decision finding disability, which the Commission had overturned. In *Adamson*, the Commission adopted the hearing examiner's proposed decision finding no disability, based upon the temporary nature of the limitations. Both cases illustrate that a claimant must prove substantial limitation by both severity and duration, and that the sufficiency of that proof is a fact question.

In the present case, Lynch established that without the absences due to her migraine headaches, she would not have suffered all of the disciplinary consequences, over a period of more than two years, up to and including discharge from her employment. Her situation was sufficiently analogous to that of the claimant in *Martinell* to support a finding that she did have a disability, even though her condition might not be permanent.

A person with a disability is qualified to hold an employment position if able to perform the essential job functions of that position with or without a

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Wilmarth v. City of Santa Rosa (N.D. Cal. 1996), 945 F.Supp. 1271; *Johnson v. A.P. Products* (S.D.N.Y. 1996), 934 F.Supp. 628; *McCollough v. Atlanta Beverage Co.* (N.D.Ga. 1996), 929 F.Supp. 1489; *Sutton v. N.M.D. of Children* (D.N.M.1996), 922 F.Supp. 516; *Mowat-Chesney v. Children's Hosp.* (D.Colo. 1996), 917 F.Supp. 746; *Rakestraw v. Carpenter Co.* (N. D. Miss. 1995), 898 F.Supp. 386; *Muller v. Auto.Club of S.Cal.* (S.D.Cal. 1995), 897 F.Supp. 1289; *Oswalt v. Sara Lee Corp.* (N. D. Miss. 1995), 889 F.Supp. 253; *Presutti v. Felton Brush, Inc.* (D.N.H. 1995), 927 F.Supp. 545; *Blanton v. Winston Prtg Co.* (M.D.N.C. 1994), 868 F.Supp. 804; *Visarraga v. Garrett* (N.D.Cal.1992), 1993 WL 209997; *Paegle v. Dpt. of Int.* (D.DC. 1993), 813 F.Supp. 61; *McKay v. Toyota Mfg., USA, Inc.* (E.D.Ky. 1995), 878 F.Supp. 1012; *Stubler v. Runyon* (W.D.Mo. 1994), 892 F.Supp. 228, ***affirmed***, 56 F.3d 69 (9th Cir. 1995).

reasonable accommodation. Admin. R. Mont. 24.9.606(2). There is no question that Lynch, but for her attendance problems, could perform her job.

2. Attendance and Reasonable Accommodation

Regular attendance at work is generally an essential job function, for obvious reasons. ***E.g.***, *Jovanovic v. In-Sink-Erator* (7th Cir. 2000), 201 F.3d 894, 899-900; *Waggoner v. Olin Corp.* (7th Cir. 1999), 169 F.3d 481, 484-85; *Nesser v. Trans World Airlines, Inc.* (8th Cir. 1998), 160 F.3d 442, 445; *Rogers v. International Marine Terminals, Inc.*, (5th Cir. 1996), 87 F.3d 755, 759; *Lyons v. Legal Aid Soc.* (2nd Cir. 1995), 68 F.3d 1512, 1516; *Tyndall v. N.E.C.* (4th Cir.1994), 31 F.3d 209, 213; *Carr v. Reno* (D.C. Cir. 1994), 23 F.3d 525, 530.[8] However, reasonable accommodation may include job restructuring and modified work schedules. Admin. R. Mont. 24.9.606(3)(b). An accommodation is reasonable unless it would impose an undue hardship upon the employer. Admin. R. Mont. 24.9.606(4). Regular attendance at work is not immune to analysis to determine if it could be modified in an accommodation.

The issue of attendance as an essential job function that cannot be accommodated has arisen in prior Montana cases. *Pannoni v. Bd. of Trustees* (Nov. 15, 2001), HR Case No. 0009009280. In *Pannoni*, the respondent school district presented convincing evidence that regular attendance of its teachers was even more critical than it ordinarily would be for teachers, due to the special circumstances of that district. There was strong evidence that a prolonged, erratic pattern of numerous absences was impossible for the district to accommodate, even though a defined prolonged absence for good cause was difficult but potentially workable. *Pannoni* contrasted with another prior Human Rights Commission case, *Kluesner v. St. Matthews School*, (April 2000), HR Case No. 9501007057. *Kluesner* involved a single prolonged absence for brain surgery, with prior notice, which the school had agreed to accommodate with a leave of absence. The recovery period lasted longer than the parties had originally anticipated, and the school discharged Kluesner. The school in *Kluesner* failed to prove either that an accommodation of the longer absence would have created an undue hardship or that attendance in accord with the original plan was an essential job function for which it could not provide any further accommodation.

In both prior cases, the ultimate issue was whether a reasonable accommodation regarding attendance was possible without undue hardship,

[8] Montana follows federal law if the same rationale applies. *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813; *Johnson v. Bozeman School District* (1987) 226 Mont. 134, 734 P.2d 209.

even though regular attendance was generally an essential job function. Like Qwest in this case, the schools in both cases established that, as a general rule, they needed and expected their teachers, in particular among their employees (like Qwest's call center workers), to show up as scheduled. Pannoni's employer went further and proved that his prolonged and erratic pattern of numerous absences created genuine hardship, because the district had to scramble to cover his classes and his students faced immediate risks of inadequate instruction and supervision. On the other hand, Kluesner's employer proved only that it needed to improvise coverage (which it did) because Kluesner was not ready to return on the expected date. Kluesner's employer did not prove either that it suffered hardship in improvising coverage or that students faced immediate risks of inadequate instruction and supervision due to the extended absence.

The factors to measure undue hardship are established by rule. Admin. R. Mont. 24.9.606(5). They include the nature and expense of the needed accommodation; the overall financial resources of the employer providing the accommodation, as well as the number of persons employed at the facility, the effect on expenses and resources of the facility, and other impacts of the accommodation on the operation of the facility; the overall financial resources of the employer, the overall size of the employer's business (number of employees as well as number, type and location of facilities); and type of operation or operations of the employer, including composition, structure, and functions of its work force and geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer. All of these factors interact with the question of the amount of cost or other burden involved for the employer in making the accommodation.

Qwest did not prove any genuine hardship. Although it provided general testimony that shortages of personnel in the call center could result in problems for customers and regulatory sanctions, it did not present evidence that such consequences did occur or were only avoided with extraordinary efforts with regard to Lynch's absences. Indeed, Qwest was in the process of cutting its call center staff when it discharged Lynch.

Qwest management apparently decided not to bother with an in-depth analysis of whether it could accommodate Lynch's absences and never did such an analysis. Qwest offered no evidence of any extraordinary efforts to assure adequate coverage necessitated by Lynch's absences. It had no proof that her absences created a present risk of customer problems. It called no witnesses to testify that it suffered or barely avoided regulatory sanctions because of short coverage arising out of Lynch's absences. Qwest did not have the evidence it needed to establish whether or not the absences had reached or would reach a

level where accommodation was a hardship, because Qwest never answered that question before firing Lynch.

Lynch proved that she had a disability and that she was qualified to hold the job because she could perform the essential job functions, including attendance (with reasonable accommodation). Admin. R. Mont. 24.9.606(2). Qwest failed to establish that allowing the migraine absences would be an unreasonable accommodation. The evidence clearly showed that Qwest never undertook a serious and detailed analysis of whether accommodation of the absences would be possible and in fact fired Lynch to avoid the need for such an accommodation. Qwest violated both subparts of the applicable regulation. Admin. R. Mont. 24.9.606(1). Qwest did not reasonably accommodate Lynch's known limitations and could not demonstrate that an accommodation would impose an undue hardship on the operation of its business[9] and Qwest discharged Lynch to avoid providing that accommodation for her limitations.[10]

C. Relief Awarded

Upon the finding of illegal discrimination by the respondents, the department ordinarily could order any reasonable measure to rectify resulting harm that Lynch suffered. Mont. Code Ann. § 49-2-506(1)(b). Lynch entered into a valid contract that waived her right to such a recovery. Ordinarily, a waiver of a right accorded for the good of the public rather than that of the individual is not subject to waiver or release. This principle prevents (for one example) exculpatory clauses in contracts or regulations from effectively relieving a public entity from any liability for its own subsequent negligence. *Haynes v. Missoula County* (1973), 163 Mont. 270, 517 P.2d 370. However, the human rights laws separate the public good (for which the Department can proceed, as already discussed in Section 6, previously) from the private right of recovery. ***Compare*** Mont. Code Ann. §§ 49-2-506(1) ***and*** 1(a) ***with*** Mont. Code Ann. § 49-2-506(1)(b). Thus, with the preservation of the public good (the uncovering and eliminating of illegal discrimination), the private

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[9] Admin. R. Mont. 24.9.606(1): "It is an unlawful discriminatory practice for an employer, agent of an employer, employment agency or labor organization to: (a) fail to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, employment applicant or union member with a physical or mental disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of the business in question . . .".

[10] Admin. R. Mont. 24.9.606(1): "(1) It is an unlawful discriminatory practice for an employer, agent of an employer, employment agency or labor organization to . . . (b) deny equal employment opportunities to a person with a physical or mental disability because of the need to make a reasonable accommodation to the person's disability so that the person can perform the essential functions of an employment position.

parties are free to contract the release of the charging party's recovery rights under a filed complaint for illegal discrimination.

Permanent injunctive relief is required upon a finding of illegal discrimination. Mont. Code Ann. § 49-2-506(1). In addition, the risk of recurrence mandates the prescription of conditions upon Qwest's future conduct relevant to the type of discriminatory practice found in this proceeding. Mont. Code Ann. § 49-2-506(1)(b).

VI. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).

2. Qwest illegally discriminated against Karen Lynch on the basis of disability (chronic severe migraines) when it discharged her from her employment on August 23, 2001, without undertaking an individualized evaluation of whether it could accommodate her disability by modifying her attendance requirements. Mont. Code Ann. § 49-2-303(1)(a).

3. Karen Lynch entered into a valid contract with Qwest, waiving her rights to recovery for the illegal discrimination, and the Department therefore will not grant her an award to rectify harm, pecuniary or otherwise, resulting from the illegal discrimination. Mont. Code Ann. § 49-2-506(1)(b).

4. The law mandates affirmative relief against Qwest, including a permanent injunction and other reasonable conditions to address the risk of future similar discrimination. Mont. Code Ann. § 49-2-506(1)(a).

VII. Order

1. The department grants judgment against **Qwest** on the charge that it discriminated against Karen Lynch on the basis of disability (chronic severe migraines) when it discharged her from her employment on August 23, 2001, without undertaking an individualized assessment of possible accommodation regarding attendance requirements.

2. Because of the waiver of any right to recovery contained in the release signed by the parties, the department grants judgment in favor of **Qwest** and against **Karen Lynch** on her request for an order requiring reasonable measures by Qwest to rectify any harm, pecuniary or otherwise, to her by reason of its discriminatory discharge.

3. The department permanently enjoins Qwest from further discrimination in employment against employees with disabilities resulting

from failure to engage in an individualized assessment of the possibility of reasonable accommodation when the disabilities interfere with attendance as scheduled.

4. The department orders Qwest to draft, for its Montana operations, policies and procedures that reflect compliance with the permanent injunction. Qwest must, within 60 days after this final decision, submit to the Human Rights Bureau the proposed policies and procedures that comply with this order, including therein the means of publishing those policies and procedures to its present and future employees, and Qwest must promptly adopt and implement those policies and procedures, with any changes mandated by the Human Rights Bureau, upon Bureau approval.

5. The department further orders Qwest to arrange and provide training regarding disability identification and accommodation for its Montana management personnel who make disciplinary decisions regarding attendance of employees. Qwest must, within 60 days after this final decision, submit a plan for the training to the Human Rights Bureau and promptly implement that plan, with any changes mandated by the Human Rights Bureau, upon Bureau approval.

Dated: September 15, 2003

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

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